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Nos. 14-556, 14-562, 14-571 and 14-574

In the
Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., *Respondents*.

VALERIA TANCO, ET AL., *Petitioners*,
v.
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., *Respondents*.

APRIL DEBOER, ET AL., *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., *Respondents*.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE ALLIANCE: STATE ADVOCATES FOR WOMEN'S RIGHTS AND GENDER EQUALITY AS *AMICUS* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is The Alliance: State Advocates for Women's Rights and Gender Equality ("the Alliance"), an alliance of state-based women's equality and gender justice legal organizations. These organizations have substantial expertise in constitutional issues related to equal protection of the laws, including with respect to discrimination based on sex, sexual orientation, gender identity, and gender stereotypes. Their expertise thus bears directly on the issues before the Court in *Obergefell v. Hodges*, No. 14-556, *Tanco v. Haslam*, No. 14-562, *DeBoer v. Snyder*, No. 14-571, and *Bourke v. Beshear*, No. 14-574. Descriptions of the individual organization-members of the Alliance are set out in the Appendix.[1]

SUMMARY OF ARGUMENT

The majority opinion in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), is based on several propositions that are fundamentally inconsistent with the Alliance organizations' real-world experience working in various states to end discrimination against lesbian, gay, bisexual, and

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[1] *Amicus curiae* submits this brief pursuant to the written consent of the parties as reflected in letters Respondents have filed with the Clerk and the written consent Petitioners have given *amicus curiae*. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a financial contribution to its preparation or submission.

transgender (LGBT) people. *Amicus* submits this brief to share this experience—which bears directly on the issues in this case—with the Court.

First, the *DeBoer* majority treated the bans on marriage of same-sex couples at issue here as classifications based on sexual orientation, and then scrutinized them under rational-basis review. This was a mistake, and not only because sexual orientation, if treated as a stand-alone classification, requires heightened scrutiny under this Court's precedents. [2] In the Alliance's experience, discrimination on the basis of sexual orientation is a form of sex-based discrimination, which is based on and aimed at reinforcing stereotypical gender roles. Ohio's, Kentucky's, Michigan's, and Tennessee's bans on marriage between same-sex couples are no different. They single out men who are perceived as "acting like women" (by forming committed, intimate relationships with men), and women perceived as "acting like men" (by forming committed, intimate

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[2] LGBT people fit all the hallmarks of a suspect class. They are a minority group who have suffered a history of invidious discrimination and relative lack of political power, and their sexual orientation is an immutable and distinguishing characteristic that bears no relation to their ability to contribute to society. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985); *United States v. Virginia* ("*VMI*"), 518 U.S. 515, 531-32 (1996); *Plyler v. Doe*. 457 U.S. 202, 216 n.14 (1982); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

relationships with women), and punish that non-gender-stereotypical behavior by denying these men and women benefits reserved for those who act in accordance with gendered expectations. They are thus sex-based classifications that should be subject to heightened scrutiny. [3] Having long recognized this reality, the Alliance organizations have advocated for LGBT rights—in some cases for decades—as part of their work of advancing gender equality.

Second, the *DeBoer* majority took for granted that absent court intervention the "democratic process" will eventually end the bans on marriage of same-sex couples in Ohio, Kentucky, Michigan, and Tennessee. The majority implicitly relied on this assumption in concluding that voters, rather than courts, should decide whether and when to license marriage of same-sex couples. Putting aside the obvious legal flaws in this reasoning—that federal courts generally have no discretion to abstain from ruling on constitutional questions and have both the power and the duty to engage in

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[3] Bans on marriage of same-sex couples are properly understood as sex-based classifications not only because they are based on and legally entrench gender stereotypes but also because they facially discriminate on the basis of sex: the only reason a man may not marry a man in Ohio, Kentucky, Michigan, and Tennessee is because he himself is a man; the only reason a woman may not marry a woman is because she herself is a woman. Numerous courts have so held. *See Latta v. Otter*, 771 F.3d 456, 480-84 & n.7 (9th Cir. 2014) (Berzon, J., concurring) (collecting cases).

judicial review for the precise purpose of safeguarding individuals' constitutional rights from majoritarian movements—the *DeBoer* majority's assumption that same-sex couples can rely on the democratic process to end marriage bans finds no support in history or reality.

Finally, the *DeBoer* majority found no injustice in its assumption that "American law will [eventually] allow gay couples to marry; [the question] is [only] when and how that will happen." 772 F.3d at 395. But in the Alliance organizations' experience, "when" matters. Same-sex couples and their children face significant burdens *today*, not only in Ohio, Kentucky, Michigan, and Tennessee, but in every state of the union, because of the patchwork of state laws on marriage. It is not enough that some of the laboratories of experimentation have already recognized marriage for same-sex couples. Until their freedom to marry is recognized in every state, they and their children will continue to suffer significant harm and uncertainty.

ARGUMENT

A. Sexual-Orientation Discrimination Is a Form of Sex Discrimination.

Alliance members are organizations dedicated to advancing women's equality and gender justice. They have worked extensively on LGBT issues because they recognize—from their

collective experience of over 115 years of work—that gender discrimination is intersectional and that discrimination on the basis of sex and discrimination against LGBT people are inextricably linked. Gender stereotypes restrict men to a narrow notion of masculinity, while animating discrimination against women because they are women and against LGBT people because of their sexual orientation or gender identity. Gender stereotypes underlie the gender hierarchy that values "male" above "female." Likewise, gender stereotypes underlie the rejection of LGBT people because they are not perceived as acting the way men and women are stereotypically expected to act. Because of this shared root in gender stereotypes and gender ideology, discrimination on the basis of sexual orientation—including the bans on marriage of same-sex couples at issue here—*is* discrimination on the basis of sex.

LGBT equality and sex equality are two facets of the same issue: legislative and populist efforts to stymy equality on either front are rooted in deep-seated, often subconscious notions of "traditional" gender roles in male-dominated societies in which women are held to be undeserving of or unsuited for the same authority, voice, and positions of power as men. One need look no further than the hateful words used to demean gay men and lesbians to confirm this self-evident truth. Gay men are called "fairies" and "pansies" because of their association with stereotypical female roles and behaviors. Lesbians are called

"butches" and "dykes" because of their association with stereotypical male roles and behaviors. The non-gender-stereotypical behavior that earns victims these badges of dishonor includes a range of conduct interpreted through a gender lens: men showing signs of "weakness" such as crying or overt nurturing behavior; women showing signs of "aggressiveness," competitiveness, "hardness," or non-vulnerability; or, most relevant here, women forming committed, intimate relationships with women and men forming committed, intimate relationships with men. *See* Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. Miami L. Rev. 511, 607-610, 617-24 (1992).

Indeed, the traditional notion of sex between a man and a woman is the most literal incarnation of society's views of the proper place of men and women. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 224 (1994) ("The idea that sexual penetration implies the subordination of the person penetrated should hardly be unfamiliar to modern Americans."); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's* Sex and Reason*: Steps Toward a Gaylegal Agenda*, 102 Yale L.J. 333, 368 (1992) (explaining that in ancient Greece, "the adult male citizen always had to be the active partner in sex; the passive partner was a social subordinate"). That a man would become the spouse of another

man and assume a "woman's place" in the intimate relationship thus threatens to upend the traditional hierarchy of men over women even more than letting women vote, or own property, or work outside the home. *See* Koppelman, *supra* at 235-36; Eskridge, *supra* at 356-57. When a state declares that it will approve only marriages between a man and a woman, it is really declaring that it will approve only (and grant special benefits only to individuals engaging in) conduct that conforms to stereotypes about gender roles.

That is discrimination on the basis of sex, lacking any rational justification—let alone an "exceedingly persuasive" one—and is therefore unconstitutional. *VMI*, 518 U.S. at 531; *see id.* at 541-42 ("[E]qual protection principles, as applied to gender classifications, mean state actors may not rely on 'overbroad' generalizations to make 'judgments about people that are likely to perpetuate historical patterns of discrimination[.]'") (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994)); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (classifications violate the Fourteenth Amendment when they are based on "fixed notions concerning the roles and abilities of males and females").

This Court has repeatedly invalidated classifications based on gender stereotypes that, like bans on marriage of same-sex couples, result from and perpetuate the hierarchy of men over women. For example, in *Stanton v. Stanton*, the

Court invalidated a statute requiring parents to support their sons until age twenty-one but their daughters only until age eighteen, recognizing that the law was impermissibly based on and entrenched the gendered assumption that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." 421 U.S. 7, 14-15 (1975).

Likewise, in *Weinberger v. Wiesenfeld*, the Court invalidated a Social Security provision that granted survivors' benefits to widowers and their children in lesser amounts than those granted to widows and their children. 420 U.S. 636 (1975). The "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children . . . c[ould] [] not suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." *Id.* at 645.

And in *Orr v. Orr*, the Court invalidated a law permitting alimony payments to be imposed only on husbands upon divorce, noting that laws "announcing the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and . . . seeking for their objective the reinforcement of that model among the State's citizens," are constitutionally impermissible. 440 U.S. 268, 279 (1979); *see also, e.g., Miss. Univ. for Women*, 458 U.S. at 729-30

(holding unconstitutional state nursing school's policy of denying admission to males, which "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job" and "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women [become] a self-fulfilling prophecy"); *VMI*, 518 U.S. at 585 (impermissible to deny women access to the finest military training in Virginia based on "'findings' . . . about typically male or typically female 'tendencies'" such as "'males tend to need an atmosphere of adversativeness,' while 'females tend to thrive in a cooperative atmosphere'") (alterations omitted).

Indeed, the Court requires heightened scrutiny of sex-based classifications precisely in order "to assure that the validity of [the] classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Miss. Univ. for Women*, 458 U.S. at 725-26. These same assumptions about the proper roles of men and women—in the home, in intimate relationships, as spouses and parents—also animate the bans on marriage of same-sex couples at issue here.

Jurists, legal scholars, and social scientists alike have recognized that bans on marriage of same-sex couples are sex-based classifications. For example, in a concurring opinion in *Latta v. Otter*,

771 F.3d 456 (9th Cir. 2014), in which the Ninth Circuit struck down Idaho's and Nevada's prohibitions on the marriage of same-sex couples, Judge Berzon explained why "the gender discrimination rubric [] squarely appl[ies]" to "the same-sex marriage bans":

> [T]he concepts and standards developed in more than forty years of constitutional sex discrimination jurisprudence rest on the understanding that "sanctioning sex-based classifications on the grounds that men and women, simply by virtue of their gender, necessarily play different roles in the lives of their children and in their relationships with each other causes concrete harm to women and to men throughout our society." [S]ame-sex marriage bans belie that understanding, and, for that reason . . . , cannot stand.

Id. at 496 (Berzon, J., concurring) (quoting Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 Harv. J.L. & Gender 461, 505 (2007)) (alterations and citations omitted); *see also id.* at 486 ("[P]rohibitions [on the marriage of same-sex couples] . . . communicate the state's view of what is both 'normal' and preferable with regard to the romantic preferences, relationship roles, and parenting capacities of men and women. By doing so, the laws enforce the

state's view that men and women 'naturally' behave differently from one another in marriage and as parents.").

Judge Berzon's reasoning echoed what scholars have explained for years. *See* Koppelman, *supra* at 202 ("[T]he prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women."); Fajer, *supra* at 516 ("[S]ince a significant purpose and demonstrable effect of anti-gay discrimination is to rigidify existing gender-role stereotypes, a society serious about eliminating gender inequality must also eliminate discrimination against gay men and lesbians."); *id.* at 618-24, 631-37; Eskridge, *supra* at 356 ("Allowing same-sex marriage would benefit many women, especially those whose social subordination has been effectuated as well as reinforced by the Western tradition of male-dominated marriage," and "would contribute to the erosion of gender-based hierarchy within the family . . . ."); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 Wis. L. Rev. 187.

Likewise, courts around the country have concluded that discriminating on the basis of sexual orientation is a way of discriminating on the basis of sex. *See Terveer v. Billington*, 34 F. Supp. 3d 100, 115 (D.D.C. 2014) (plaintiff's allegation that discrimination occurred because of his "status as a homosexual"—without more—plausibly suggested the discrimination was based on gender

stereotypes) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037-38 (N.D. Ohio 2012) (plaintiff's allegations that his supervisor discriminated against him because he is married to a man and took his husband's last name "*is* a claim of discrimination because of sex"); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (belief that women should only be attracted to and date men is a gender stereotype).

Indeed, the Alliance organizations have long worked to fight for LGBT equality, both because injustice against LGBT people is a distinct constitutional wrong, and because the effort to end LGBT discrimination is a necessary part of the effort to end all forms of gender inequality. *Cf.* Koppelman, *supra* at 202. For example, since the 1980s, Legal Voice, an Alliance member based in the Pacific Northwest, has brought ground-breaking lawsuits and has fought for legislation to end discrimination against LGBT people on all fronts, including by serving on the governing board of Washington United for Marriage, the coalition that successfully advocated in 2012 to ratify

legislation extending civil marriage to same-sex couples in the state of Washington.[4]

Similarly, for over forty years, Women's Law Project ("WLP"), an Alliance member based in Pennsylvania, has engaged in impact litigation challenging discrimination (including sexual-orientation discrimination) rooted in gender stereotypes. WLP served as counsel to *amici curiae* in several landmark decisions in Pennsylvania, including: *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised; *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples; and *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual-orientation discrimination.

And the mission of Gender Justice, an Alliance member based in Minnesota, is to eliminate gender barriers whether linked to sex, sexual orientation, gender identity, or gender expression, in large part by dismantling damaging stereotypes about femininity and masculinity.

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[4] For a summary of Legal Voice's work on LGBT rights since the 1980s, *see* Legal Voice, *Celebrating Equality*, http://legalvoice.org/focus/lgbt/documents/LegalVoiceLGBTwork1980s-2014.pdf.

Gender Justice works on behalf of anyone facing gender discrimination, advocating for women and girls, but also for men and boys, and for LGBT individuals who challenge gender norms. Because of its focus, Gender Justice challenges institutions that are simultaneously homophobic and misogynistic, like the Pink Locker Room tradition which denigrates opposing team members by suggesting that they are "girls and sissies." Along with cases challenging pregnancy discrimination, sexual harassment of immigrant workers and of low-income renters, and the failure to promote women, Gender Justice has brought cases reinforcing the right of LGBT individuals to be free from sexual-orientation harassment at work, and path-breaking cases to enforce the rights of transgender individuals to be free from discrimination by employers and health-care providers.

The Alliance organizations' commitment to LGBT rights initiatives over the last forty years is consistent with their understanding of the true nature of gender inequality. They believe that all forms of gender discrimination are linked, and that sexual-orientation discrimination must be analyzed as a facet of sex discrimination.

Bans on marriage of same-sex couples are state-backed legal regimes that are based on and reinforce gender stereotypes that harm everyone, including LGBT people and heterosexual and non-transgender women and men oppressed by the

imposition of those stereotypes. Such bans cannot stand.

B. Experience in Most States Demonstrates that Same-Sex Couples Cannot Rely on the Democratic Process To Win the Freedom To Marry.

The *DeBoer* majority concluded that bans on marriage of same-sex couples pass muster under the Fourteenth Amendment because, as a prudential matter, the issue is best left to voters. In other words, the court characterized the issue before it not as whether the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, but rather as "[w]ho [should] decide[]"—the people, through the "state democratic processes," or the courts. 772 F.3d at 396; *see id.* (framing the issue as which "route the United States Constitution contemplates"); *id.* at 402 ("democracy-versus-litigation path to same-sex marriage").

As an initial matter, this circular logic sidesteps altogether the *constitutional* question the court was required to answer: whether the Constitution provides relief when the democratic process produces discriminatory policies. As Judge Daughtrey explained in dissent, the question here is not "who should decide" but rather "whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment." *Id.* at 421 (Daughtrey, J.,

dissenting); *see also Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014) ("Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law."), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1228 (10th Cir. 2014) ("[T]he judiciary is not empowered to pick and choose the timing of its decisions" and "may not deny [same-sex couples] relief based on a mere preference that their arguments be settled elsewhere."), *cert. denied*, 135 S. Ct. 265 (2014).

But even assuming the question the majority set about to answer was relevant (whether same-sex couples should be left to win their freedom to marry through the "democratic process"), its answer was incorrect. *See DeBoer*, 772 F.3d at 403 ("the definition of marriage" should not be "constitutionaliz[ed]" but rather left "in the hands of state voters"). The majority's conclusion rested on one central premise: same-sex couples' freedom to marry is only a matter of time, and so the judiciary should stand back and allow same-sex couples to secure that equal treatment through the democratic process rather than the courts. *See id.* at 395 ("[T]he question is not whether American law will allow gay couples to marry; it is when and how that will happen."); *id.* at 396 (suggesting that in the absence of federal court action, "the democratic processes begun in the States [to recognize marriage between same-sex couples will] continue in the four States of the Sixth Circuit"); *id.* at 407 (characterizing "state democratic forces" and

"evolving community mores" as "already coming to terms with a new view of marriage"); *id.* at 409 ("In . . . [s]tates [that currently do not license marriages between same-sex couples], the people seem[] primed to" "re-amend[] their constitutions to broaden the category of those eligible to marry"); *id.* at 415 ("succeeding more and failing less are in the offing" for same-sex couples). After all, the Court of Appeals reasoned, same-sex couples will surely feel better about winning the freedom to marry if they "earn[] [it] through initiatives and legislation . . . rather than through decisions issued by a majority of Supreme Court Justices[.]" *Id.* at 417-18; *see id.* at 421 ("Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories . . . .").

In the Alliance organizations' experience, the premise underlying the majority's conclusion—that same-sex couples' freedom to marry, secured through the democratic process, is a foregone conclusion and simply a matter of getting out into "the neighborhoods and communities in which gay and lesbian couples live" to win over the last remaining "heads and hearts," *id.* at 417—fundamentally misunderstands how difficult it has been and will continue to be to end marriage bans through the democratic process. Contrary to the majority's opinion, that process *cannot* be relied upon in either the short or long term to secure the freedom to marry for same-sex couples.

As an initial matter, of the thirty-seven states that now recognize marriages of same-sex couples, the overwhelming majority—twenty-five, including the Alliance states of Alaska, California, Idaho, Iowa, Montana, Oregon, New Mexico, Pennsylvania, and Wisconsin—arrived there through court order, not a vote of the legislature or the people.[5] For example, the Alliance state of Pennsylvania was one of fifteen states to amend their marriage laws in 1996 in response to *Baehr v. Lewin*, a Hawaii Supreme Court decision holding that Hawaii's law prohibiting marriage between two people of the same sex "establish[ed] a sex-based classification," 852 P.2d 44, 64 (Haw. 1993). 1996 Pa. Laws 706; *see* Pa. Legis. J. (H.R.) 2017 (June 28, 1996) ("Do you want a group of judges in Hawaii determining Pennsylvania's laws and policies?"). It took a ruling by a Pennsylvania federal court—eighteen years later—striking down Pennsylvania's law on Fourteenth Amendment grounds for same-sex couples in that state to secure the freedom to marry. *See Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

Another Alliance state, California, is a particularly noteworthy example. Same-sex couples there won the freedom to marry from the California Supreme Court in 2008. *In re Marriage Cases*, 183

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[5] *See* Nat'l Conference of State Legislatures, *Same-Sex Marriage Laws* (Feb. 9, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx (last visited Mar. 4, 2015).

P.3d 384 (Cal. 2008). Before the ink was dry on that opinion, however, opponents were already organizing Proposition 8, the "Eliminates Right of Same-Sex Couples to Marry Act," which was adopted by a majority vote of the people later that year and which amended the state constitution to ban marriages of same-sex couples. Stymied by the voters, proponents of the freedom to marry in California were forced back to the courts, eventually regaining equal treatment only after a federal court declared Proposition 8 unconstitutional. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

The history of ending bans on marriage for same-sex couples in this country is thus not—as the *DeBoer* majority suggested, 772 F.3d at 396—a series of parallel tracks in the legislatures, populace, and courts, all reaching (or destined to reach) the same result. The judiciary has often had to step in and exercise its proper role: protecting minorities' rights from the majoritarian impulses of the democratic process. *See* The Federalist No. 78 (Alexander Hamilton) ("[J]udges . . . guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency, in the meantime, to occasion . . . serious

oppressions of the minor party in the community."); The Federalist No. 51 (James Madison) ("It is of great importance in a republic . . . to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure."). That same-sex couples have had success in the *courts* says nothing about their prospects for convincing voters to grant them the freedom to marry.

Even in the few states where voters *have* been so convinced, the process was long, arduous, and expensive. For example, efforts to end the ban on marriage for same-sex couples in the Alliance state of Washington began in 1971, when a same-sex couple was denied a marriage license and subsequently brought a lawsuit in state court arguing that Washington's Equal Rights Amendment and the U.S. Constitution prohibited the denial of marriage licenses to same-sex couples. *See Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). The Washington Court of Appeals rejected this argument, *id.*; the Washington Supreme Court denied review, *Singer v. Hara*, 84 Wash. 2d 1008 (Wash. 1974); and the next twenty years saw almost no movement in the state to win the freedom to marry. Then, in 1998, in a further setback and on the heels of the enactment of the federal Defense of Marriage Act ("DOMA"), Pub. L. No. 104-199, 110 Stat. 2419 (1996), the Washington legislature passed a statute banning civil marriage for same-sex couples, overriding a gubernatorial veto. 1998 Wash. Sess. Laws 1. After a lengthy

battle in the courts, including a lawsuit brought by Alliance member Legal Voice, the Washington Supreme Court in 2006 ruled by a five-to-four margin that the statute did not violate the state constitution. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

Following the defeat in court, the Washington state legislature passed a series of laws from 2007 to 2009 to establish and expand the rights and obligations of domestic partners. 2007 Wash. Sess. Laws 616; 2008 Wash. Sess. Laws 24; 2009 Wash. Sess. Laws 3065. After the final bill was passed in 2009, which extended to registered domestic partners virtually all the rights and obligations afforded to married couples under state law, opponents of the domestic partnership law promptly sponsored a referendum to rescind the bill. After an expensive, statewide campaign, voters narrowly approved the legislation.[6]

In 2012, the Washington legislature finally passed a law allowing same-sex couples to marry. 2012 Wash. Sess. Laws 199. Opponents of the law again sponsored a referendum to rescind it. Proponents of the freedom to marry spent over $12 million dollars and countless hours over the months

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[6] *See* Wash. Sec'y of State, *Referendum Measure 71 Concerning Rights and Responsibilities of State-Registered Domestic Partners*, http://results.vote.wa.gov/results/20091103/Referendum-Measure-71-concerning-rights-and-responsibilities-of-state-registered-domestic-partners.html (last visited Mar. 4, 2015).

that followed to win approval later that year.[7] Finally, on December 6, 2012, over forty years after the freedom-to-marry movement began in Washington, the first marriage licenses were issued to same-sex couples in the state.

The process in Minnesota, another Alliance state, was equally long, difficult, and uncertain. As in Washington, the first lawsuit challenging Minnesota's refusal to recognize marriage between same-sex couples was brought in the 1970s and ended in defeat when the Minnesota Supreme Court upheld Minnesota's refusal to license their marriage and this Court summarily dismissed the couple's appeal. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). In 1997, the Minnesota legislature passed its own version of DOMA, prohibiting "marriage between persons of the same sex." 1997 Minn. Laws ch. 203, art. 10. In 2010, three same-sex couples challenged the law in Minnesota state court. The trial court rejected the plaintiffs' constitutional arguments and dismissed their suit. *See Benson v. Alverson*, No. A11-811, 2012 WL 171399, at *1 (Minn. Ct. App. Jan. 23, 2012). A few months later, the Minnesota legislature proposed an amendment to the state constitution to provide that marriage

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[7] *See* Wash. Sec'y of State, *Referendum Measure No. 74 Concerns Marriage for Same-Sex Couples*, http://results.vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples.html (last visited Mar. 4, 2015).

can only be the union of one man and one woman. 2011 Minn. Laws ch. 88. Proponents of the freedom to marry mobilized to defeat the amendment, spending over $12 million to win by a margin of forty-seven to fifty-three percent.[8] Only after this narrow victory did the legislature introduce and ultimately pass freedom-to-marry legislation in 2013. *See* 2013 Minn. Laws ch. 74.

The process is certain to be even more difficult in Ohio, Kentucky, Michigan, Tennessee, and the remaining states with still-standing constitutional amendments banning marriage of same-sex couples. Whereas proponents of the freedom to marry in Washington and Minnesota were able to engage the usual "democratic process" in support of their cause, that avenue for relief is closed off to proponents in states with constitutional amendments forbidding the licensing of marriages of same-sex couples. Absent court intervention, the only way for same-sex couples in these states to secure their freedom to marry is to *re*-amend the constitution—which typically requires a super-majority vote or a ballot initiative.

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[8] *See* Minn. Legislative Reference Library, *Constitutional Amendments*, http://www.leg.state.mn.us/lrl/mngov/constitutionalamendments.aspx (last visited Mar. 4, 2015); Sasha Aslanian, *Marriage Amendment Fight Topped $18M*, Minnesota Public Radio News (Feb. 1, 2013), http://www.mprnews.org/story/2013/02/01/politics/marriage-amendment-campaign-finance-reports.

This is no easy (or inexpensive) task. Thus far, ballot measures to affirmatively recognize same-sex couples' freedom to marry have passed in only three states—Maine, Maryland, and Washington—compared with the more than *thirty* ballot initiatives passed in other states *banning* marriage of same-sex couples.[9] And proponents of the freedom to marry will increasingly find themselves up against supremely well-funded opponents willing to spend significant sums to block their efforts at the ballot box. The National Organization for Marriage, for example, has pledged "to raise as much as it takes" to defeat freedom-to-marry initiatives.[10] In short, the only "democratic process" left open to proponents of the freedom to marry in these states is an exceedingly uphill and expensive battle that is likely to take another generation or longer.

The difficulty of ending discrimination against LGBT people through the "democratic

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[9] *See* Nat'l Conference of State Legislatures, *Same-Sex Marriage on the Ballot* (Nov. 7, 2012, 5:10 AM), http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx (last visited Mar. 4, 2015); Nat'l Conference of State Legislatures, *Same-Sex Marriage Laws* (Feb. 9, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx (last visited Mar. 4, 2015).

[10] *See* Juliet Eilperin, *Gay Marriage Fight Will Cost Tens of Millions*, The Washington Post (July 1, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/01/how-much-will-the-gay-marriage-fight-cost-over-the-next-three-years-tens-of-millions/.

process" is exemplified by the slow and uneven progress LGBT advocates have made in securing passage of laws expressly prohibiting sexual-orientation discrimination in employment. Despite widespread public support for such laws,[11] only twenty-one states have adopted laws expressly banning such discrimination since the first state passed such a law 1982; twenty-nine currently offer no express protections; and no state has passed an

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[11] *See, e.g.*, Dennis Romboy, *Support for Statewide Nondiscrimination Law Growing in Utah, Poll Shows*, Deseret News (Oct. 21, 2014, 2:20 PM), http://www.deseretnews.com/article/865613621/Support-for-statewide-nondiscrimination-law-growing-in-Utah-poll-shows.html?pg=all (recent poll found sixty-five percent of Utah residents support statewide sexual-orientation antidiscrimination statute); Public Policy Polling, *Warner Safe for Reelection* (May 30, 2013), http://www.publicpolicypolling.com/pdf/2011/PPP_Release_VA_53013.pdf ("By a margin of 80%-12%, Virginians do not think employers should be allowed to discriminate against employees based on sexual orientation."); The White House, *Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good For Business* (July 21, 2014), http://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0 (recent national survey of 1,200 registered voters found sixty-three percent favor federal sexual-orientation antidiscrimination law) (last visited Mar. 4, 2015).

express sexual-orientation antidiscrimination law since 2009.[12]

The state of Washington again provides a useful example of the difficulties of passing LGBT-favorable measures through the democratic process. A sexual-orientation antidiscrimination bill was first introduced in the Washington legislature in 1977 and was proposed repeatedly in subsequent years, failing each time.[13] In 1997, proponents of an express prohibition on discrimination sponsored a ballot initiative. but the voters rejected it by a vote of sixty to forty percent.[14] It was not until 2006—twenty-nine years after legislation was first proposed—that the legislature amended Washington's Law Against Discrimination to expressly prohibit discrimination on the basis of sexual orientation. 2006 Wash. Sess. Laws 12; Wash. Rev. Code § 49.60.10.

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[12] National LGBTQ Task Force, *State Nondiscrimination Laws in the U.S.* (May 21, 2014), http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_new.pdf. Some states have passed laws prohibiting discrimination based on gender identity (as distinct from sexual orientation) since 2009. *Id.*

[13] *See* Andrew Garber and Ralph Thomas, *State Gay-Rights Bill Passed 29 Years After Effort Began*, The Seattle Times (Jan. 28, 2006, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=20060128&slug=gayrights28m (last visited Mar. 4, 2015).

[14] *See* Wash. Sec'y of State, *Election Search Results, November 1997 General*, http://www.sos.wa.gov/elections/results_report.aspx?e=6&c=&c2=&t=&t2=&p=&p2=&y= (last visited Mar. 4, 2015).

Meanwhile, Pennsylvania still has not passed legislation expressly banning sexual-orientation discrimination in the workplace, despite repeated introductions of a proposed bill since 2001 and a seventy-two percent statewide approval rating for the bill as of 2013.[15] Similarly, in the Alliance state of Idaho, after a nine-year "Add the Words" campaign to add "sexual orientation" to the Idaho Human Rights Act, the legislature still has failed to pass the proposed bill into law, despite the support of over two-thirds of Idahoans.[16] The notably mitigated success equality advocates have had through political channels on the nondiscrimination front only reinforces how unrealistic it is to assume that the freedom to marry through the democratic process is only a matter of time.

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[15] Monica Disare, *In the Northeast, Only Pa. Lacks Law on Discrimination by Sexual Orientation*, Pittsburgh Post-Gazette (July 29, 2013, 12:00 AM), http://www.post-gazette.com/news/state/2013/07/29/In-the-Northeast-only-Pa-lacks-law-on-discrimination-by-sexual-orientation/stories/201307290195.

[16] *Idaho House Committee Rejects Add the Words Bill Along Party-Line Vote*, Idaho Statesman (Jan. 29, 2015), http://www.idahostatesman.com/2015/01/29/3617387/idaho-house-committee-to-debate.html; Bob Bernick, *Poll: Idahoans Think It Should Be Illegal To Discriminate Against LGBT Residents*, Idaho Politics Weekly (Jan. 4, 2015) http://idahopoliticsweekly.com/politics/16-poll-idahoans-think-it-should-be-illegal-to-discriminate-against-lgbt-residents.

C. The Patchwork of State Laws on Marriage for Same-Sex Couples Creates Significant Harms and Uncertainty for Same-Sex Couples and Their Children.

Even if the *DeBoer* majority could guarantee same-sex couples in Ohio, Kentucky, Michigan, and Tennessee that they will eventually win the freedom to marry through the democratic process, that guarantee would do nothing to address the significant harms and uncertainty same-sex couples throughout America face *right now* and will continue to face until the patchwork of marriage laws is replaced by the same scheme of universal recognition enjoyed by different-sex couples.

As state-based organizations, the Alliance members recognize the role of federalism and the laboratories of experimentation it can foster. But as the Court made clear last Term, "[t]he States' interest in defining and regulating [activities and relations within their borders, including] the marital relation, [is] *subject to constitutional guarantees*." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (emphasis added); *see Bostic v. Schaefer*, 760 F.3d 352, 374 (4th Cir. 2014) ("*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving* [*v. Virginia*, 388 U.S. 1 (1967)]'s admonition that the states must exercise their authority *without* trampling constitutional guarantees."), *cert. denied*, 135 S. Ct. 308 (2014) (emphasis added); *Kitchen*,

755 F.3d at 1228 ("[T]he experimental value of federalism cannot overcome [individuals' constitutional] rights to . . . equal protection.").

This teaching of *Windsor* is important here. When it comes to regulating marriages of same-sex couples, the laboratories of experimentation have produced a patchwork of laws that make everyday life exceedingly difficult, uncertain, and *unequal* for same-sex couples and their children. Real examples from Alliance organizations' experience illustrates this inequality.

i. Children. In states that recognize marriages of same-sex couples, the birth of a child by one spouse should confer the legal status of parent on the biological parent's spouse—consistent with the legal status of parents and children in different-sex marriages. Nevertheless, Alliance organizations still recommend to same-sex couples whose marriage is recognized in their home state that the non-biological parent take the additional step—and incur the additional expense and invasiveness—of going to court for a second-parent adoption, in which the non-biological parent legally "adopts" the child. Foregoing this expense risks non-recognition of the non-biological parent's status as parent upon moving or traveling to another state. The likelihood that a same-sex couple will at some point in their lives move to a non-recognition state and face this differential treatment is far from negligible. Approximately nine percent of Americans have relocated across state lines within

the last five years, and approximately thirty-one percent have done so at some point in their lifetime. *See* Raven Molloy, Christopher L. Smith, and Abigail Wozniak, *Internal Migration in the United States*, 25 J. Econ. Perspectives 173 tbl. 1 (2011). Different-sex married couples, by contrast, do not have to worry about whether their parental rights will vanish upon crossing state lines.

ii. Security when traveling. Married same-sex couples and their children also face risks and costs not borne by their different-sex counterparts when traveling interstate. Same-sex couples have no guarantee, even if they are legally married, that their marriages will be respected while in non-recognition states. The story of Janice Langbehn and Lisa Pond, a same-sex couple from Washington who had been together for over eighteen years, brings these concerns to life. Ms. Langbehn and Ms. Pond were vacationing in Miami, Florida with their three children in 2007 when Ms. Pond collapsed with an aneurysm. An ambulance took Ms. Pond to a trauma center at a nearby hospital. while Ms. Langbehn and their children followed in a taxi. Over the course of that afternoon and evening, as Ms. Pond progressed toward her death, Ms. Langbehn and the children were refused access to Ms. Pond's room and denied information about her status and condition. At midnight—nearly eight hours after they arrived at the hospital, and not until after Ms. Pond had succumbed to unconsciousness—her children were finally able to visit her. Meanwhile, Ms. Langbehn was given just

one five-minute visit, when a priest administered last rites. Ms. Pond was declared brain-dead the next morning. Soon after Ms. Pond's death, Ms. Langbehn attempted to obtain her death certificate in order to seek life insurance and Social Security benefits for her children. Both the State of Florida and the Dade County Medical Examiner denied her request.[17]

Different-sex married couples traveling interstate need not fear the kind of treatment the Langbehn-Pond family suffered. The marriages of different-sex couples, and the unique rights that attach (such as hospital visitation) are respected in all fifty states. Not so for same-sex couples, who travel to non-recognition states at their peril.

iii. "Wedlocked" couples. In all fifty states, different-sex couples have the right not only to marry but also to divorce when the union is no longer working. Because every state generally recognizes every other state's different-sex marriages, they also open their courts to divorce proceedings for different-sex couples married in other states. By contrast, same-sex couples who marry in a state where they are permitted to do so, move to a non-recognition state, and later wish to

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[17] *See* Tara Parker-Pope, *Kept from a Dying Partner's Bedside*, The New York Times (May 18. 2009), http://www.nytimes.com/2009/05/19/health/19well.html?_r=0; Lambda Legal, *Langbehn v. Jackson Memorial Hospital*, http://www.lambdalegal.org/in-court/cases/langbehn-v-jackson-memorial (last visited Mar. 4, 2015).

divorce often cannot secure the legal closure their different-sex counterparts take for granted. For example, the Alliance organizations periodically hear from married same-sex couples who wish to divorce, but cannot: they now live in a state that does not recognize their marriage and will not process their divorce, and they are unable to secure a divorce from the state in which they were married because they are no longer residents. They are thus stuck in limbo and forced to remain legally married to a person with whom they no longer wish to share their life, unless they upend their lives by moving to a state that will permit them to obtain a divorce.

Just as "real people who teach our children, create our jobs, and defend our shores" are behind the bans on marriage for same-sex couples at issue in this case, *DeBoer*, 772 F.3d at 410, so are "real people"—same-sex couples and their children—*victims* of these bans. Until marriage bans are lifted in *every* state of the union, same-sex couples and their children—even those living in states that license their marriage—will face significant, undeserved disadvantages and uncertainty.

CONCLUSION

Because the sexual-orientation discrimination at issue here is a form of sex discrimination that is subject to and fails heightened scrutiny; because same-sex couples cannot rely on the political process to win their freedom to marry; and because same-sex couples

and their children suffer daily harms and uncertainty as a result of the patchwork of marriage laws across the United States, this Court should reverse the decision of the Court of Appeals and hold that the Fourteenth Amendment requires the States to license and recognize marriages between two people of the same sex.

Respectfully submitted.

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APPENDIX

Legal Voice

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a regional non-profit public interest organization based in Seattle that works to advance the legal rights of women in the five Northwest states (Washington, Oregon, Idaho, Montana, and Alaska) through litigation, legislation, and education. Since its founding, Legal Voice has worked to eliminate all forms of sex discrimination, including gender stereotyping. To that end, Legal Voice has a long history of advocacy on behalf of lesbians, gay men, bisexuals, and transgender individuals. Legal Voice has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. Legal Voice also served on the governing board of Washington United for Marriage, the coalition that successfully advocated in 2012 to extend civil marriage to same-sex couples in Washington State.

California Women's Law Center

California Women's Law Center ("CWLC") is a statewide, non-profit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy, and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its

inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. California same-sex couples won the freedom to marry through the courts in 2008, in the *In re Marriage Cases* that CWLC supported through an *amici curiae* brief in support of the challenge to the marriage exclusion. They subsequently lost the freedom to marry through a voter-approved ballot measure, and had to win it again in federal court. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms, including eliminating laws that reinforce traditional gender roles. CWLC views sexual-orientation discrimination as a form of illegal gender discrimination that is harmful to our state and needs to be eradicated.

Southwest Women's Law Center

The Southwest Women's Law Center is a non-profit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential, including by eliminating gender bias, discrimination and harassment. *Obergefell v. Hodges*, *Tanco v. Haslam*, *DeBoer v. Snyder*, and *Bourke v. Beshear* could help prevent discrimination in matters involving the most intimate and personal choices that people make during their lifetime. Personal

intimate choices that individuals make for themselves are central to the liberty protected by the Fourteenth Amendment.

Women's Law Project

Founded in 1974, the Women's Law Project ("WLP") is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. For nearly forty years, WLP has engaged in high-impact litigation, advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented the plaintiffs in *Planned Parenthood v. Casey*, 505 U.S. 833, 898 (1992), striking down the Pennsylvania Abortion Control Act's husband notification provision as "repugnant to this Court's present understanding of marriage and the nature of the rights secured by the Constitution." WLP served as counsel to *amici curiae* in *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001), which conferred third-party standing on parents in same-sex relationships to sue for partial custody or visitation of the children they have raised; and *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), which recognized that the Pennsylvania Adoption Act permits second-parent adoption in families headed by same-sex couples. WLP also represented women in non-traditional employment as *amici curiae* in *Prowel v. Wise Business Forms, Inc.*, 579

F.3d 285 (3d Cir. 2009), in which the Court of Appeals reinstated a Title VII sex discrimination claim involving concurrent evidence of sexual-orientation discrimination. Because harmful gender stereotypes often underlie bigotry against lesbian and gay persons, it is appropriate to subject classifications based on sexual orientation to heightened judicial scrutiny.

Gender Justice

Gender Justice is a non-profit organization that eliminates gender barriers—whether linked to sex, sexual orientation, gender identity, or gender expression—through impact litigation, policy advocacy, and education. Gender Justice's mission is to dismantle damaging stereotypes about femininity and masculinity. The organization takes a three-pronged approach to advocacy, combining the most current science on the root causes of discrimination, strategic court cases, and lasting public policy change. Gender Justice works on behalf of anyone facing gender discrimination, advocating for women and girls, but also for men and boys, and for LGBT individuals who challenge gender norms. Gender Justice believes that discriminatory attitudes towards LGBT persons, including the refusal to recognize marriage for same-sex couples, are rooted in and reinforce harmful gender stereotypes.